Lois Development Corporation d/b/a Wallace Theaters *and* Hotel Employees and Restaurant Employees, Local 5, AFL–CIO. Cases 37–CA–4579, 37–CA–4665, and 37–CA–4696

February 27, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On July 29, 1999, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel and the Charging Party Union each filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Randy M. Girer, Esq. and *Peter S. Ohr, Esq.,* for the General Counsel.

Ronald Y. K. Leong, Esq. and *Lester M. H. Goo, Esq. (Watanaabe, Ing & Kawashima),* of Honolulu, Hawaii, for the Respondent.

Amy Martin, Esq. and *Ashley Ikeda, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for the Union.

[1] The Charging Party Union has excepted and the General Counsel has effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Union engaged in informational picketing at the Respondent's movie theaters between February 2 and June 12, 1996, whereas the General Counsel has asserted on exceptions that the Union's picketing occurred only during March and April 1996. We find it unnecessary to resolve this factual discrepancy as the exact dates of the Union's picketing are immaterial to our ultimate conclusion here.

In adopting the judge's finding that the Respondent did not engage in bad-faith bargaining here, we find it unnecessary to pass on his conclusion that the parties "clearly [had] reached an impasse" when bargaining ended on January 28, 1997. We also do not adopt or rely on the judge's opinion that the contract proposed by the Respondent would clearly have been a contract that "stinks."

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Honolulu, Hawaii on April 15, 16, 19, and 20, 1999.[1] The charge in Case 37–CA–4579 was filed on November 5, 1996, by Hotel Employees and Restaurant Employees Local 5, AFL–CIO (the Union). The charge in Case 37–CA–4665 was filed by the Union on March 13, 1997. The charge in Case 37–CA–4696 was filed by the Union on April 9, 1997. Thereafter, apparently on April 25, 1997,[2] the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing alleging violations by Wallace Theater Corporation, named correctly herein as Lois Development Corporation d/b/a Wallace Theaters (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based n my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Hawaii corporation with an office and place of business located in Honolulu, Hawaii, from which it is engaged in the business of operating motion picture theaters. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $500,000 and annually purchases and receives at its Honolulu, Hawaii location products, goods, and materials valued in excess of $5000 which originated from points outside the State of Hawaii. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(a)(1) and (5) of the Act by failing to comply with the provisions of Section 8(d) of the Act, namely "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of

The correct name of the Respondent appears as amended at the hearing.

[2] The complaint appears to be inadvertently dated March 25, 1997.

employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

B. The Facts

On November 13, 1995, following a representation election, the Union was certified by the Board as the collective-bargaining representative of "All employees including all floor staff (ushers, usher/booth employees, box cashiers, and concession employees)" at its multiplex theater location in Honolulu, Hawaii. Approximately 60 employees are included in this unit.

Bargaining negotiations commenced on January 5, 1996, and continued for over a year; the last bargaining session was held on January 28, 1997. Then, on March 11, 1997, following the filing on that date of a decertification petition in Case 37–RM–306, the Respondent wrote to the Union advising that "the Company believes that the Union does not currently have the majority support of the bargaining unit employees" and that further bargaining was therefore not appropriate. Concurrently, the Respondent filed a related petition in Case 37–RD–160. On March 31, 1999, the Board determined that these petitions, which were dismissed by the Regional Director, are subject to reinstatement, if appropriate, pending final disposition of the instant unfair labor practice proceeding.

During the course of bargaining the Union was represented by five different business agents or representatives. The Respondent was represented solely by its general manager, Brett Havlik. At the first negotiating session Havlik advised the union representatives of his total unfamiliarity with collective-bargaining negotiations, as this was the first of the Respondent's some 27 theaters, located on various islands in Hawaii, and also on the mainland, in California, Nevada, and Missouri, to become represented by a union. He also advised the Union that his responsibilities as general manager were substantial and expanding due to the Respondent's business plan of acquiring and building additional theaters both in Hawaii and on the mainland, and that his business-related travel schedule was necessarily extensive.[3] As a result of these considerations he requested that the Union accommodate his schedule and suggested that the bargaining sessions be limited to 2 hours' duration.

The union representatives apparently had no problem with this at the outset of negotiations and the procedure for scheduling subsequent meetings became standard practice: Havilk would advise the Union of his availability for future meetings and offer the Union certain dates, and the union representatives would accept or reject the dates according to their availability.

Havlik testified that the Respondent's corporate managerial hierarchy consisted of a three-man operation consisting of Wallace, the president, who had very limited experience in the daily operation of theaters but who concentrated on acquiring additional theaters, a comptroller who handled financial matters, and Havlik, who essentially handled everything else. Havlik believed that his position as general manager and his expertise with the theater business, coupled with his knowledge of the Respondent's business philosophy and the fact that he would eventually have to work with the Union in the administration of any contract reached, made him uniquely qualified to negotiate the contract. For these reasons, coupled with cost considerations, Havlik decided that he, rather than an outside representative or attorney, would conduct the negotiations for the Respondent.

Havlik testified that he approached bargaining very cautiously, and specifically advised the union representatives of his inexperience in union matters. He questioned unfamiliar terminology and concepts until he believed that he understood the ideas and proposals being presented to him. He spent considerable time preparing for each meeting, and conferred with his attorney several times prior to and usually once after each meeting, and advised the Union that this was his practice.

The Union had recently completed the negotiation of a contract with another theater chain, Consolidated Amusement Company (Consolidated), a large multistate operation and competitor of the Respondent that enjoyed approximately a 90-percent share of the theater business in Hawaii. The Respondent's operations were much smaller. Prior to the first negotiating session the Union forwarded a complete contract proposal to Havlik, which was virtually a carbon copy of the Consolidated contract.

The first and second negotiating sessions were held on January 5 and 11, 1996. During these initial meetings the parties discussed, line-by-line, the Union's aforementioned written proposals which, as noted, were tailored to the business operations of Consolidated. Havlik verbally responded to each of the Union's proposals, and during these discussions Havlik immediately rejected most of the proposals as being incompatible with the Respondent's overall business philosophy and daily operations. Havlik testified that it became quite apparent that the Union's fixation with the Consolidated contract would not facilitate bargaining, as the only real similarity was that both Consolidated and the Respondent operated theaters.

Accordingly, Havlik endeavored to educate the union representatives by explaining that while Consolidated, a well-established, profitable, and much larger entity, employed mainly full-time employees and provided them with certain benefits, the Respondent found it most profitable to employ only part-time employees, mainly high school and college students, providing them flexible hours, paying them minimum wage, and offering them no benefits except perhaps free movie passes, with the knowledge that such employees would come and go and that the Respondent's rate of employee turnover would be substantial. Accordingly, Havlik viewed such concepts as job classifications, seniority, vacations, and a progressive wage scale based on longevity, all matters of importance to the Union, as being fundamentally inapplicable to the interchangeable jobs, minimum wages, and high turnover rate among the Respondent's employees. Further, because the Re-

[3] The Respondent runs a very lean organization, and Havlik's duties include the negotiation of construction contracts and related contracts for new theaters, the booking of films for each theater, and personnel matters that are not resolved by the individual theater managers. In addition, Havlik does not have a secretary and types his own correspondence, including bargaining proposals and related bargaining letters and documents.

spondent was a relatively new entity and was continually seeking to expand its operations and acquire or build additional theaters, the greatest profitability or the "bottom line" was of the essence in order to increase operating capital. Accordingly, the Respondent was interested in a contract with the Union that would not only not lessen its profitability, but would even perhaps enhance it if possible.

At the outset of the next negotiating session on February 2, 1996, the Union endeavored to cause Havik to reexamine the Respondent's approach to collective bargaining. This was the first and only meeting attended by Anthony Rutledge Sr., the Union's financial secretary-treasurer. The meeting, scheduled for 2 hours, instead lasted 9 minutes. Rutledge asked if the Respondent's position had changed. Havlik said no. Rutledge, becoming angry and animated, stated that the Respondent's position "sucks" and, according to Havlik, "that Local 5 was breaking off negotiations, [and] had no further wish to negotiate." Havlik stated that he thought he was there to hear the Union's responses to his counterproposals that he had offered at the prior meeting. Rutledge began comparing the Respondent with Consolidated, and Havlik reiterated that they were two distinct entities with two distinct business philosophies. Rutledge, according to Havlik, "called us carpetbaggers, [and] stated that Local 5 had a million dollars in the bank to keep us from building, and that it was his intention to drive us out of the State of Hawaii." Rutledge also stated that the Union intended to picket the Respondent's theaters. Then Rutledge abruptly stated that the meeting was over and that the next meeting was "on call." Havlik replied that he was available for further negotiations. Then he was escorted out of the Union's building.

Immediately thereafter the Union commenced to engage in informational picketing, apparently at only the one theater complex covered by the instant certification. There was no communication between the parties for over 2 months. Then, on April 9, 1996, the Union wrote to the Respondent protesting alleged interim unilateral changes, and demanded that the Respondent bargain with the Union over such changes. On April 12, 1996, Havlik replied and stated that he would be happy to meet and discuss any concerns with the Union, and requested that the Union phone him and set up a mutually agreeable meeting date. Again, by letter dated May 2, 1996, Havlik requested a meeting and forwarded certain information to the Union regarding the interim changes. By letter dated May 3, 1996, the Union requested certain updated information from the Respondent relative to contract negotiations "because a considerable amount of time has past since our last negotiating session." And in another letter, also apparently inadvertently dated May 3, 1996, but hand delivered to the Respondent on May 15, 1996, the Union stated, "At our last negotiating session, you were to get back to the Union with your proposals for a collective-bargaining agreement. You have not presented any proposals to date." The letter goes on to request "a list of all dates that you will be available for negotiations in May and June."

Havlik immediately responded the same day. Thus, by letter dated May 15, 1996, Havlik summarized what had transpired between the parties during the first three meetings, stating that, "During [the first two] meetings I provided the Union with my counter proposals for each issue in which we were in disagreement. To each of our counter proposals the Union representative stated that he would "take it under advisement . . . . As of today's date we are still waiting for the Union to respond to our counter proposals. If you would like our previously discussed counter proposals in writing I will be happy to comply just let me know."[4] Havlik then goes on to state:

> Regarding my availability for negotiation meetings for the months of May, and June I have listed below the dates I should be available. In order to schedule a meeting on any of these days it will be necessary for you to contact my office in advance for an appointment. Please keep in mind that these dates are tentative and subject to change based upon my ongoing responsibilities as General Manager of the Wallace Theater Corporation.
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> > May: 16, 22, 29, 30 & 31; June 11, 12, 13, 14, 18, 19, 20, 21, 26, & 27
>
> Once again I would like to state that I am willing to meet and discuss our reasonable counter proposals and hopefully reach a mutual [sic] agreeable position on any of the before mentioned dates. Please feel free to contact me if you have any further questions or comments on this matter.

On May 16, 1996, apparently during the course of a brief meeting that was not regarded as a negotiating session, Havlik presented the Union with bargaining materials it had requested on May 3, 1996. Thereafter, on May 29, 1996, Havlik faxed the Union "a summary of my handwritten notes of the Company's initial responses to the union's initial collective bargaining proposals."

The Respondent's written summary begins as follows:

> Per my correspondence of May 16, 1996 enclosed please find a written outline of the Wallace Theatre Corporation's (The Company) counter-proposals, which were previously submitted to the union verbally during our negotiation meetings several months ago.

It appears unnecessary to review these proposals in any great detail. The four and one-half page single spaced typewritten summary clearly and succinctly sets forth the Respondent's position, sometimes accompanied by the Respondent's rationale underlying such proposals, on each and every significant contract item except one.[5] For example, regarding Item 1.4 of the Union's proposal, Havlik counters with: "The Company proposes a 90 day probationary period. The Company proposes that Union membership not be mandatory as a condition of

[4] Havlik favorably impressed me as a very candid and straightforward individual with a clear recollection of the events in question. To the extent that the testimony of the various union representatives or the representations made in correspondence from the Union to Havlik differs materially from Havlik's testimony or the representations made in Havlik's responses to the Union, I have no hesitation in crediting the testimony and representations of Havlik.

[5] The exception is the item regarding the Union's grievance proposal. In response to this, Havlik states: "The Company does not agree with the grievance procedure outlined by the union and requests additional time to formulate their own plan, which shall include a provision governing arbitration procedures."

employment." And in response to Item 3.1 of the Union's contract proposal, Havlik proposes:

> The Company proposes that the union be responsible for collecting any dues, assessments, or any other monies owed them by their membership. Due to the fact that less than half of the bargaining unit voted in favor of union representation the Company does not want to act as the Union's "collection agency" for dues and assessments which employees may not wish to pay. The Company feels that our involvement in the collection of these monies could hurt our employee relations since the Union was not supported by a clear majority.[6]

It was not until June 5, 1996, that the Union replied to Havlik's aforementioned May 15, 1996 list of proposed bargaining dates. The record is unclear concerning the failure of the Union to timely respond: According to Union Representative Sean Muntz, the Union was awaiting certain requested information and written proposals from Havlik before it scheduled further bargaining. However, Muntz also testified that, "if you took all of those dates [proposed by Havlik] then you'd obviously be clogging up someone's schedule. But you take the ones that are most convenient for you at that time." And Muntz testified that he "didn't want to get off on the wrong foot . . . with anybody by saying you offered all these dates, we're taking them all."

By the time the Union did respond, of course, all of the proposed dates in May had passed. And while the Union accepted the dates of June 12, 13, 14, 26, and 27, Havlik had made certain other commitments for several of those dates during the interim, as he had previously cautioned the Union that such proposed dates were subject to change. Thus, of the 15 bargaining dates proposed by Havlik for the months of May and June, 1996, the Union selected only five dates in June and, due to the Union's belated response, Havlik was available for only three of those dates.

The next negotiating session was held on June 12, 1996, more than 4 months after the preceding February 2, 1996 session. Thereafter, 17 additional sessions were held: June 26 and 27, August 1, 2, and 28, September 5, October 11, 18, 22, 24, and 25, November 5 and 21, and December 19, 1996, and January 9, 17, and 28, 1997. During this period of some 7 months the same procedure of scheduling meetings was generally followed: Havlik would furnish the Union with the dates he was available, and the Union would accept or reject them. On at least several occasions the Union rejected dates proposed by Havlik, and on occasion, for business-related reasons or illness (infra) Havlik would have to cancel dates previously offered the Union. The bargaining sessions lasted from 2 to 3 hours, primarily as an accommodation to Havlik, and during the latter months of bargaining the Union requested that Havlik meet more frequently and for longer periods of time. While both parties agreed that significant progress was being made within the bargaining format under which the parties were operating, the Union was allegedly of a mind that more and longer negotiating sessions would be even more productive. Havlik, on the other hand, did not believe that more frequent or prolonged meetings would expedite the bargaining process, but rather believed that shorter meetings where the parties understood that time was valuable, were, in fact, more productive for that very reason; and further, he was able to utilized the time between meetings to prepare for the next meeting and confer with his attorney as he continued to do before and after each meeting. In fact, Havlik frequently requested that the union representatives forward to him in advance the proposals and materials they wanted to discuss, so that he would be prepared for such discussions and thus the bargaining time could be utilized more efficiently.

On one occasion, at the persistence of the Union, Havlik agreed to a 4-hour meeting, and, as Havlik testified, after only 3 hours the parties seemed to have nothing more to say to each other and the meeting ended. On another occasion the Union sent a business representative, Diaz, to conduct negotiations because of the unavailability of the Union's regular chief negotiator at that stage of the negotiations.[7] Diaz admitted to Havlik that he was simply filling in for that one session, and that he was unprepared to bargain and was unfamiliar with the course of bargaining. As a result, this particular meeting lasted only a short time and no progress was made.

I do not credit the testimony of several union representatives who testified that Havlik made it a consistent practice of looking at his watch and after 2 hours would abruptly end the session, or that Havlik's pager would beep after 2 hours and Havilk would announce that he would have to leave. Rather, I credit Havlik who testified that he does not wear a watch, that a scheduled 2- or 3-hour session would end at an appropriate juncture either before or after the allotted time depending upon whether discussion of a particular item had been completed, and that his pager went off only one time throughout the course of negotiations.

Union Representative Sean Muntz, who had not attended any of the initial negotiating sessions, became the chief spokesperson for the Union beginning June 12, 1996, the date the parties resumed negotiations after the 4-month hiatus. Muntz testified that he had received the Respondent's written proposals prior to the meeting and they were discussed. Muntz apparently objected to the format of Havlik's written "proposals" and characterized them as merely "notes" with "interpretive comments" rather than proposed contract language which could be used as a basis for bargaining. Muntz requested that Havlik remove such "interpretative comments" from seven of the Respondent's proposals, and Havlik, according to Muntz, did so. Nevertheless, apparently because the Respondent's proposals were not couched in conventional contract language, the parties primarily worked off of the Union's proposals as a starting point.

[6] The tally of ballots served upon the parties at the conclusion of the election shows that of approximately 56 eligible voters, 22 cast ballots for and 8 cast ballots against the Union, and there were 5 challenged ballots.

[7] The Union had different chief negotiators at different stages of the negotiations. Indeed, Havlik testified that this succession of union chief negotiators tended to prolong bargaining as it would be necessary to acquaint each of them with the Respondent's business philosophy so that they would understand the rationale underlying the Respondent's proposals and the Respondent's reluctance to adopt certain union proposals.

Muntz testified that, "There was no bargaining process. It was our proposal, the answer [by Havlik] no, and us dropping it to try to move along." Thus, after discussion, the position of the Respondent on most significant items prevailed and, according to Muntz, "The way we would come to an agreement is we would back down on just about everything, including things like minimum wage." As noted above, negotiating sessions were held on June 12, 26, and 27, 1996. According to Muntz, by the end of these three sessions numerous tentative agreements had been verbally reached but had not been signed off by the parties. Thus, according to Muntz, tentative agreement had been reached on the following items: union recognition and union security; probationary period; hours and overtime; minimum time; posting of job vacancies; seniority; sickness and industrial benefits; maternity leave; discipline or discharge; shop stewards; leave of absence for union business; and uniforms.

Muntz testified that between June 12, 1996, when he began to participate in negotiations, and October 10, 1996, when the Respondent submitted a complete contract proposal to the Union, "[I]t was clear that up to that point . . . we were making headway and progress, mainly, at my caving in on a lot of language, that I would just drop it in order to move along." And subsequent to October 10, 1996, after a dispute regarding what had previously been tentatively agreed to and whether, in fact, tentative agreement meant tentative agreement primarily in concept, as Havlik maintained, or whether it meant tentative agreement in both concept and language, with certain modifications, as Muntz argued, the parties resolved their differences. During the course of this disagreement Havlik advised Muntz that in the Respondent's written proposal of October 10, 1996, he had not intended his proposed language to change any substantive or conceptual understandings, and that he would modify such language if Muntz could show him where he had allegedly erred. Thereafter, according to the testimony of both Muntz and Havlik, substantial headway was made at the succeeding negotiating sessions during which some of the previous "tentative agreements" were renegotiated and signed off by the parties.[8]

Further negotiating sessions were held on October 11, 18, 22, 24, and 25, 1996.

On October 21, 1996, Muntz faxed to the Respondent "a complete written counter-proposal package representing the Union's position," and advised Havlik that Clem Valeri would be representing the Union at the meeting scheduled for the following day, October 22, 1996. On October 23, 1996, Muntz sent Havlik "a consolidated compromise counter proposal" which included all items previously agreed to and closed.

By letter dated October 29, 1996, Muntz requested that Havlik submit a list of dates he would be available for bargaining for the month of November 1996, and suggested that "we would like to schedule marathon bargaining sessions that are longer than the two hours you have recently been affording the Union." Further, Muntz suggested that it would facilitate bargaining to have the Respondent's attorney present during negotiations. The letter concludes as follows:

> Finally, the pending negotiations between Wallace Theaters and Local 5 must begin to be a priority for the company. Your inability to provide the Union with additional bargaining dates and longer bargaining sessions only serves to delay conclusion of negotiations, and can only be viewed as a failure by the Company to meet its good-faith requirement under the National Labor Relations Act.

By letter dated October 30, 1996, Muntz requested that the parties begin bargaining about the weekly work schedule of each employee and on all subsequent work schedules, and on all other employment and working conditions. And on October 31, 1996, Muntz renewed certain of the requests contained in his October 29, 1996 letter.

On November 1, 1996, Havlik, in a lengthy reply, responded to Muntz' three aforementioned letters. Havlik states that while scheduling issues are mandatory subjects of bargaining, the Union's request that the Respondent bargain over each and every employee's work schedule "is clearly unreasonable and harassing," and the Respondent "cannot agree to waive its legal rights to determine certain basic management functions necessary for the orderly running of its business." Havlik goes on to offer the dates of November 5, 19 and, tentatively, November 21, 1996, for further negotiating sessions, each lasting 2 hours, stating that, "As per our prior practice, the company would again request that the time frame for our meeting be maintained in order to ensure the orderly running of our business," and that, "In the interest of better utilizing our meeting time together, the company would again reiterate its request that the Union provide it with a proposed agenda of items for negotiation [at] least 24 hours prior to our scheduled meeting." The letter continues, inter alia, as follows:

> As I indicated to you, the company believes that the negotiation process would be furthered if the parties were to agree on an agenda of items to focus in on at negotiations prior to our meetings, as opposed to continuing to proceed in the somewhat chaotic and confusing fashion that the Union insists upon. This agenda would, of course, not preclude the discussion of other pertinent items, but would at least provide the parties with a more focused approach to negotiations.
>
> As a related matter, the company would also request that the Union provide the company with its written bargaining proposals in a more diligent and timely fashion, as opposed to its current practice of less than 24 hours prior to our scheduled meetings. The Union's current practice places an undue and unfair burden on the company to review and analyze the Union's proposals on such short notice and hinders the bargaining process.
>
> Finally, the company must take exception to your statement that "pending negotiations between Wallace Theatres and Local 5 must begin to be a priority for the company." Such self-serving and false statements are nei-

[8] Because of the dispute that had arisen regarding whether the unsigned "tentative agreements" were agreements primarily in concept or both in concept and language, Havlik initiated the procedure of including a signature block for each item which would be "signed off" by both parties in order to eliminate any further such disputes. I credit the testimony of Havlik and find that Respondent initiated the idea of the signature blocks in order to expedite the bargaining process.

> ther reflective of a good faith intent nor conducive to promoting fruitful negotiations. The Union is well aware that its negotiations with the [Respondent] has always been and continues to be a high priority for the company. The parties have already had 15 bargaining sessions commencing in January of this year, and [the Respondent] continues to make every effort to further the negotiation process.

On November 1, 1996, Union Representative Valeri sent Havlik an 18-page "compromise package of contract proposals" and suggests that further bargaining sessions may hopefully bring about the "conclusion of contract negotiations." Havlik received the package at about 4 p.m. on November 4, 1996, the evening prior to the scheduled November 5, 1996 negotiating session.

Havlik faxed Muntz an immediate reply stating, inter alia, that due to the lengthy counterproposal and the unreasonably short period of time provided by the Union for him to review the proposals, he "will be unable to meet and discuss these counter proposals at our bargaining session scheduled for 11:00 am November 5, 1996." Havlik goes on to state that he will need "at least three weeks time to properly review and prepare for our next bargaining session." And on the morning of November 5, 1996, Havlik faxed Valeri a similar letter and advised him that he would not be prepared to discuss the Union's most recent counterproposals at the meeting scheduled for that day, but would be able to review the October 25, 1996 counterproposals submitted by the Union at the October 25, 1996 bargaining session.

On November 5, 1996, the Union filed its initial charge in this matter, alleging various violations of Section 8(a)(5) of the Act, including "failing to provide adequate meeting dates and times," and "failing to provide responses to union counterproposals within a proper and reasonable time frame."

On November 8, 1996, Muntz sent a letter to Havlik containing the Union's revised proposals. However, Havlik left for the mainland on business on November 7 and was not scheduled to return until about November 15, 1996.

Further negotiating sessions were held on November 5 and 21, and December 19, 1996; and on January 9, 17, and 28, 1997. As noted above, progress continued to be made throughout this period of time, and contract items continued to be signed off by the parties. On January 13, 1997, Valeri wrote to Havlik that as of that point in time the following contract items remained open: management rights, wage rates, deduction of union dues, layoff and recall, duration of agreement, and effective date of agreement. At the January 17, 1997 session the parties signed off on a management-rights provision.

At the schedule 3-hour January 28, 1996 session it was clear that there were only a few contract items outstanding, one of which was wages. From the very outset of bargaining the Respondent had been adamant that it would agree to pay its employees only the minimum wage required by law. The Union, realizing that its continued insistence upon a wage increase and progressive wage scale for the employees was simply not acceptable to the Respondent, offered to accept the Respondent's minimum wage proposal. Further, as it was the Union's policy not to collect union dues unless an initial contract provided for a wage increase, the Union withdrew its dues-deduction proposal. The Union also proposed a 1-year agreement containing a midterm reopener clause, effective 6 months after the effective date of the agreement, providing for the renegotiation of any three contract items the Union elected to renegotiate. Thus, at the conclusion of the meeting the open items were layoff and recall, the duration/reopener provision, and effective date of the contract.

Muntz testified that that in order to accept the Respondent's minimum wage proposal it was necessary for the Union to have a short-term contract: "[I]f we go for a short-term contract it's going to be easier with wages. We go for a long-term contract we're going to be locked into something that stinks." Further, on January 28, 1997, when the Union agreed to the Respondent's minimum wage proposal, Muntz recalled Havlik stating that, "well, this looks good to us now. Maybe we want a longer duration."

Havlik testified that during a negotiating session in August 1996, he advised that Union that at that point the Respondent was disposed to a 1-year or perhaps a 2-year agreement, but also pointed out that the duration of the agreement was dependent upon how favorable he viewed the terms of the contract that was ultimately reached. Havlik testified that at the point when the Union accepted his minimum wage proposal during the January 28, 1997 meeting he believed a 3-year contract with no wage increases for the duration of the contract was in the Respondent's best interests. Havlik further testified that although he replied to the Union's proposals with verbal counterproposals and some written proposals throughout negotiations, collective bargaining was a learning experience for him and he approached it very cautiously. Consequently, there was a long "gestation period" during which he became familiar with the bargaining process, and after which, on October 10, 1996, he felt comfortable enough to put together a complete written proposal that, if accepted by the Union, would be satisfactory to the Respondent.

By letter dated January 30, 1997, Havlik advised the Union that the Respondent was rejecting the Union's proposal on layoff and recall and duration of agreement. Thereafter it appears that Valeri attempted to contact Havlik by phone on several occasions but was unsuccessful. On February 10, 1997, Havlik requested a 2-hour negotiating session for February 20, 1997, stating that due to his travel schedule this was the earliest available meeting time he could arrange. Union Representative Valeri accepted this date. However, on the morning of February 20, 1997, Valeri was advised that Havlik was ill and would be unavailable for the meeting. Valeri proposed that they meet on February 26, 27, and 28, 1997, and on February 24, Havlik replied stating that that due to his travel and business operations schedule his next available meeting date would be a 3-hour meeting on March 13, 1997. This date was accepted by Valeri.

Havlik was on a lengthy business trip on the mainland from about February 24, 1997, until March 10, 1997. On March 11, 1997, Havlik wrote Valeri informing him that he had been away on business. Havlik also advised Valeri that the Respondent was declining to negotiate further because, based on objective considerations, the Respondent believed the Union no longer had the majority support of the bargaining unit employ-

ees. As noted above, the employees' decertification petition had been filed that same date.[9]

C. Analysis and Conclusions

The General Counsel stated, emphasized and, on several occasions, reiterated at the hearing that this is not a surface bargaining case but rather a straightforward "mechanics of bargaining" case. There is no complaint allegation that the proposals of the Respondent were improper or that the Respondent failed and refused to engage in good-faith bargaining or engaged in delaying tactics or otherwise engaged in conduct designed to avoid reaching an agreement.[10] Moreover, despite the fact that bargaining commenced on January 5, 1996, the General Counsel maintains and the complaint alleges that the Respondent did not commence to violate the Act until June 12, 1996, some 5 months later, in the following respects:

- The Respondent insisted that the duration of each negotiation session be no longer than two to three hours.
- From about June 1996 until October 10, 1996, Respondent failed to provide a complete written counter proposal.
- From about November 1996 through about March 11, 1997, Respondent failed to make a representative available at reasonable times for negotiation sessions.

The General Counsel argues that to limit negotiating sessions to 2 to 3 hours is per se unreasonable, and that if Havlik would have agreed to bargain for more than 2 to 3 hours at a time, or had hired a consultant or attorney who would have been available for longer negotiating sessions, it is likely that more progress would have been made. I do not agree. It would appear that whether or not the parties' negotiations are consonant with Section 8(d) of the Act is dependent upon the interaction of certain variables, such as the length and frequency of meetings, the opportunity of each party to present its proposals, the nature of the proposals, the candor of the parties in presenting their points of view and in rebutting proposals with which they disagree, and, most importantly, the actual progress made during the course of negotiations.

In just the first two negotiating sessions the parties had completely reviewed, line-by-line, the Union's entire contract proposal, and Havlik had candidly pointed out exactly why he believed the Respondent's business philosophy was incompatible with the Union's demands. That the Union clearly and unmistakably understood the Respondent's position is underscored by the fact that at the outset of the third meeting the Union stated that the Respondent's position "sucked," threatened to put the Respondent out of business, stated to Havlik, I find, that bargaining was being suspended until further notice from the Union, and thereafter began picketing the Respondent's theaters from February 2 until about June 12, 1996, without any interim bargaining. That the parties got to this stage of negotiations in just two meetings is, in my estimation, indicative of Havlik's efficiency in focusing on the issues and presenting his position to the Union in the most expedient manner because, indeed, as he candidly stated to the Union, his schedule kept him very busy.

Then, some 4 months later, beginning with the date the parties renewed negotiations on June 12, 1996, progress was clearly made; and beginning at about the time the Respondent submitted its complete set of written bargaining proposals on October 10, 1996, progress not only continued, but accelerated. All of this admitted progress was made during the course of bargaining sessions lasting 2 to 3 hours. And it is important to note that at no point did any of the union representatives who testified herein ever state that they did not have the opportunity to discuss with Havlik each and every contract item in as much detail and in as great a length and as often as they wanted. Thus, it has not been demonstrated that more or lengthier bargaining meetings would have been any more productive. Indeed, it is equally as arguable that had the parties engaged in marathon bargaining ad nauseum less progress would have been made as there would have been no particular incentive to utilize the time in a productive manner. I shall dismiss this allegation of the complaint.

As maintained by the General Counsel and alleged in the complaint, the Respondent did not provide a complete written counterproposal until October 10, 1996, after 10 negotiating sessions. However, there is no contention that the Respondent was stalling for time and, further, there is no 8(d) requirement that the Respondent ever provide a complete written counterproposal. Nor is there any showing that prior to that time the Union was unaware of the position of the Respondent on any open issue. Indeed, up to that point, as noted, the parties were making progress even though the Respondent's proposals were mainly verbal. While the Respondent's complete written counterproposal may have facilitated negotiations by permitting the Union to suggest modifications to the Respondent's proposed language, there were 11 negotiating sessions after October 10, 1996, and, as noted above, there is no showing that the Union did not have ample time during the remaining course of bargaining to utilize the Respondent's written proposals for whatever purposes and to the extent that it wanted.

The General Counsel argues that the dramatic progress that postdated the Respondent's written proposal package shows that it was the proposal package that was the catalyst for this progress. This purported cause-and-effect relationship is not

[9] Following the Respondent's withdrawal of recognition the Union maintained that in fact a complete contract had been reached and that the Respondent was obligated to sign it. The Union filed a charge containing such an allegation and it was dismissed. While the Union apparently continues to maintain that an agreement was reached, the General Counsel is specifically not contending that the parties reached agreement, and the credible record evidence, I find, supports the position of both the General Counsel and the Respondent that no agreement was reached.

[10] The General Counsel specifically stated at the hearing that she was not moving to amend the complaint to allege such allegations, but suggested that since, over the strong objection of General Counsel, the entire course of bargaining had been explored on the record at the hearing, it was within the discretion of the administrative law judge to, sua sponte, make findings of violations not specifically alleged in the complaint. I decline to do this because the record evidence clearly mandates the conclusion that the Respondent has not, in fact, failed to bargain in good faith.

necessarily the reason for such progress. Thus, from the commencement of negotiations the Union had been specifically made aware of the Respondent's position on each and every contract item the Union deemed important, and the Respondent's package simply confirmed what the Union already knew. By this point in time, approaching the end of the certification year, the Union may have decided that any further effort to change Havlik's thinking on open items seemed highly unlikely, that economic sanctions were obviously not effective, and that it was time to bring the matter to some conclusion.

While the General Counsel maintains that it was the Respondent's delay in presenting its complete written counterproposals that hampered bargaining, this is not necessarily the case. It has not been demonstrated, I find, that bargaining was hampered at all by any conduct or failure to act on the part of the Respondent. And if the bargaining process was initially not as productive as the parties might have wished, it is just as reasonable to place the onus on the Union for causing a 4-month hiatus in negotiations, or for not accepting all of the Respondent's proposed negotiating dates in May and June 1996, and indeed, for placing Union Representative Diaz in charge of a negotiating session when he was totally unprepared to negotiate. Had the Union utilized its time and resources more wisely it is likely that the "gestation period" required by Havlik would have been considerably attenuated, and that the Respondent's package would have been submitted well before October 10, 1996. I shall dismiss this allegation of the complaint.

It is alleged that from about November 1996, through about March 11, 1997, Respondent failed to make a representative available at reasonable times for negotiation sessions. During this period there were six negotiating sessions and others were scheduled. Insofar as the credible record evidence shows it was a mere coincidence that Havlik was ill and was unable to attend the scheduled February 20, 1997 session. And, insofar as the credible record evidence shows, it was a mere coincidence that a decertification petition was filed before the parties could get together after January 28, 1997, for their next bargaining session. As noted, there is no contention that Havlik's unavailability during this period of time was contrived in an effort to promote or permit time for employees to circulate a petition to decertify the Union. No one expected that there would be no further negotiations after January 28, 1997. Up to that time there had been 21 negotiating sessions extending over a year, I find, of good-faith bargaining, despite the fact that the Union had imposed an interim 4-month bargaining moratorium during which it elected not to bargain. I shall dismiss this allegation of the complaint.

Finally, in response to the General Counsel's contention that there were only two open items and the parties were virtually at the culmination of an agreement, I view the record evidence quite differently. Indeed, I find it unlikely that the parties were at all close to an agreement. They had clearly reached an impasse on the remaining issues: the Union wanted a reopener on three unidentified items of their choosing after 6 months of a 1-year contract which provided for minimum wages, while the Respondent wanted a 3-year contract with minimum wages and with no reopener. This meant that the Union, if it agreed with the Respondent, would be committing the employees to minimum wages with no wage increase for 3 years during which time the Union would be required by law to represent these employees despite the fact that none of the employees would be supporting the Union through dues.[11] As Muntz testified, the Union was not going to be locked into a long-term contract that "stinks." Clearly, this would have been a contract that fit that description.

Accordingly, I shall dismiss the complaint in its entirety.[12]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated Section 8(a)(5) of the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended[13]

ORDER

The complaint is dismissed in its entirety**.**

[11] As noted above, the Union does not collect dues from employees absent a contractual wage increase during the term of an initial contract.

[12] See *88 Transit Lines, Inc.*, 300 NLRB 177 (1990).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.